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Attorney for plaintiffs and putative class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LUNELL GAMBLE, and SHEILA
KENNEDY, on behalf of themselves as
well as a class of similarly situated
individuals,

11 || Plaintiff

12 | vs.

13 KAISER FOUNDATION HEALTH
14 PLAN, INC; KAISER FOUNDATION
15 HOSPITALS, INC.; and THE
16 PERMANENTE MEDICAL GROUP;
all doing business as KAISER
PERMANENTE MEDICAL CARE
PROGRAM

17 || Defendants

Case No. 4:17-cv-06621-YGR

**DECLARATION OF COUNSEL IN
SUPPORT OF PLAINTIFFS' RULE
16 MOTION FOR AN ORDER
ADDRESSING SETTLEMENT
POSTURE AND POTENTIAL
CONFLICT OF INTERESTS**

(Per ECF 103, parties to be notified if a hearing will be required.)

Hon. Yvonne Gonzalez Rogers

1 Jeremy L. Friedman declares and states:

2 1. I am attorney of record for named plaintiffs and the putative class in this case. I
3 make this declaration in support of plaintiffs' Rule 16 motion concerning the parties'
4 settlement posture and potential conflicts of interest. It is based upon my own personal
5 knowledge. If called as a witness, I would and could testify competently to the following
6 matters.

7 2. Employment discrimination litigation has been one of the three principal focuses of
8 my 30 years of practice. Since I began my legal career, I have had at least one employment
9 discrimination action pending on my docket of cases at any one time. My specialty in this
10 arena is the ability to take an employment case from intake, through trial and appeal, on my
11 own or with select association of counsel. As a sole practitioner, I cannot assume more than
12 one or two such cases at a time, and so must plan carefully around which I take, how long
13 they develop and whether association is required. Several of my most significant
14 employment discrimination actions were against Kaiser, including race and disability
15 discrimination actions on behalf of African-American women. Litigating these cases
16 against Kaiser over the past two decades has taught me an enormous amount about Kaiser's
17 structure, employment practices and legal defenses, and settlement tactics.

18 3. I was one of the attorneys representing plaintiffs and the putative class in Hill v.
19 Kaiser Foundation Health Plan, Inc., Case No. 3:10-cv-02833-LB (initially assigned to
20 Judge Seeborg). The dispute over Kaiser's settlement tactics in that case resulted in
21 substantial post-settlement proceedings over waiver of attorneys' fees. As a result of that
22 effort, I have modified the approach to settlement and fees in this case, including additional
23 language in client retainer agreements, and the decision to bring this Rule 16 motion.

24 4. As is typical in discrimination actions, plaintiffs Gamble and Kennedy required
25 legal representation by experienced counsel such as myself, but they were unable to pay my
26 high hourly rate on a non-contingent basis. It was therefore necessary for them to find an
27 attorney willing to take their cases on a contingent basis. Moreover, legal fees in their cases
28 against Kaiser were expected to quickly outpace plaintiffs' damages. In my experience,

1 there are no limits on the amount of legal resources Kaiser might require of my in my
2 litigations against it. Plaintiffs could not have secured my representation on a pure-
3 contingency fee basis, tied to a percentage of their recovery.

4 5. As expressly discussed and agreed upon orally, and as written into the retainer
5 agreements, I agreed to represent plaintiffs as clients, conditioned on their assignment of
6 rights to recover any and all statutory fees which may be awarded by judgment or settlement
7 in the action. In the written agreement, plaintiffs agreed:

8 All attorneys' fees recovered pursuant to any statutory or common law fee-shifting
9 provisions, Federal and California, for work done in connection with this litigation
10 are property of the attorneys, as provided by California law (*Flannery v Prentice*)
and shall not be regarded as property of the client.

11 6. Each agreement contained the following clause concerning assignment and the
12 potential conflict of interest that might arise during settlement discussions:

13 The Court may order, or the parties to the litigation may agree, that the defendants
14 will pay some or all of attorneys' fees, costs, or both. Any such order or agreement
15 will not affect Client's obligations under this agreement except as stated in this
16 Section regarding calculation of the amount of attorneys' fees owed under this
17 agreement and as stated in Section 6. Client agrees that any attorneys' fees that may
18 be recovered from defendants in this case shall belong to Attorneys, to whom Client
19 assigns her rights. Client understands that, under California law, the assignment of
20 these rights may raise a potential conflict of interest between Client and Attorneys in
the context of settlement agreements. This includes Attorneys right to claim,
negotiate and settle any claim to statutory fees simultaneously with the
representation of Client in the prosecution of her claims. Client has been advised of
this potential conflict, of her option of seeking additional legal counsel in connection
with this conflict, and Client expressly agrees to this assignment.

21 7. The retainer agreements also included an acknowledgment of the contingent nature
22 of the representation, and its impact on the calculation of reasonable fees.

23 Client has been given the choice of paying monthly for attorneys' fees on an hourly
24 rate basis and for costs, as an alternative to a contingent fee. Client understands that
25 if she chooses to pay fees on an hourly rate basis, rather than a contingent fee basis,
she must pay all fees and costs even if the claims are lost. Clients knowingly and
26 voluntarily agrees to pay fees on a contingent fee basis, or have statutory fees paid at
a rate that is a multiple of Attorneys' then-current noncontingency hourly rate
(*Ketchum v. Moses*), because fees are not paid before any amount is recovered and
27 Client will not owe any attorneys' fees if she does not prevail against defendants.
28

1 8. In Section 6, the retainer agreements detailed the arrangement between plaintiffs
2 and counsel during settlement:

3 It is agreed that no settlement of these claims may be made without Client's prior
4 agreement. If, in settlement of this litigation, Client waives the right to recover
5 attorneys' fees, costs or expenses (including partial waivers or compromises) without
6 the consent of Attorneys, Client agrees to pay Attorneys: for waiver of fees,
7 Attorneys' lodestar amount (their then-current hourly rate, as stated in section 5, as
8 of the date of recovery times the number of hours expended on the case) times a
9 contingent-risk multiplier of 2.0; and for waiver of costs, all of the costs advanced by
10 attorneys in this case, whether or not a positive recovery is made by Client. Client
11 understands that this agreement may give rise to potential disputes and conflicts
12 between Attorneys and Client at the time of settlement, and in particular, where the
13 defendants offer a settlement conditioned on the waiver, partial waiver or
14 compromise of fees or costs and Attorneys are unwilling to agree to the waiver,
partial waiver or compromise. Client understands that this agreement to pay the
difference between Attorneys' statutory fees and costs and the amount of fees and
costs paid in settlement may limit, or even nullify Client's recovery, and dissuade
her from agreeing to a settlement with the defendants. Client has been advised of the
option of seeking additional legal counsel on the topic. Client expressly agrees to
this provision because she knows that otherwise Attorneys would be unwilling to
enter into this agreement.

15 9. In addition to these contractual provisions, as a rule I protect against actual
16 conflicts of interest during settlement discussions, by refusing to negotiate against my
17 clients over "lump sum" offers. In all of my employment discrimination cases, I attempt
18 first to negotiate a resolution of the clients' recoveries, independent of the claim to fees. For
19 planning purposes, at the start of settlement discussions I may inform defendants or the
20 settlement judge about my current hourly rates, the time I have expended to date, and my
21 expectations on risk multipliers. In some particular situations, based on specific factors, I
22 voluntarily am willing to facilitate a settlement by reducing or capping my claim to
23 statutory fees. By and large, I will not attempt to settle fees while simultaneously
24 representing my clients in discussions over settlement of damages.

25 10. After extensive experience litigating discrimination actions against Kaiser, as well
26 as the failed mediation effort concerning plaintiff Gamble, I can attest to the policy and
27 practice of Kaiser to avoid or reduce its liability by trying to pit plaintiffs' counsel against
28 their own clients during settlement discussions. Often hidden behind a non-existent veil of

1 “settlement confidentiality,” Kaiser often will
2 – Offer “lump sum” settlements covering plaintiffs’ damages and counsel’s statutory
3 attorneys’ fees, insisting that opposing parties and their counsel fight between
4 themselves as to how the “lump sum” should be split.
5 – Insist that plaintiffs and counsel waive the right to claim statutory attorneys’ fees,
6 arguing that counsel is in breach of ethical obligations towards the client if he
7 holds up a settlement due to fees.
8 – Refuse to negotiate over attorneys’ fees in good faith, consistent with the adjusted
9 lodestar methodology required under Title VII and FEHA, while simultaneously it
10 rejects the submission of fees to the Court for determination.

11 11. Following the failed mediation effort between Kaiser and plaintiff Gamble, I wrote
12 a demand letter to Kaiser’s attorneys, specifically so that there would be a record of
13 plaintiff’s settlement posture outside any mediation privilege. A true and accurate copy of
14 this demand letter is attached hereto as Exhibit A. Although we had hoped to engage Kaiser
15 in settlement discussions, and at least obtain an offer of settlement on damages uncoupled
16 from a demand to waive fees, Kaiser refused to respond to the settlement demand.

17 I declare under penalty of perjury that the foregoing is true and correct. Executed this
18 22nd day of May, 2019.

19 /s/Jeremy L. Friedman
20 Jeremy L. Friedman

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that the foregoing was filed with the Clerk of the Court for the
23 Northern District of California, by using the CM/ECF system. I certify that all participants
24 in the case are registered CM/ECF users and that service will be accomplished by the
25 CM/ECF system.

26 /s/ Jeremy L. Friedman
27 Jeremy L. Friedman
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